STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-619

August 25, 1998

PUBLIC UTILITIES COMMISSION
Renewable Resource Portfolio
Requirement (Chapter 311)

NOTICE OF RULEMAKING

WELCH, Chairman; NUGENT, Commissioner

I. INTRODUCTION

In this Notice, we initiate a rulemaking to establish the requirements and standards governing the implementation of the renewable resource portfolio requirement.

During its 1997 session, the Legislature fundamentally altered the electric utility industry in Maine by deregulating electric generation services and allowing for retail competition beginning on March 1, 2000.[1] At that time, Maine's electricity consumers will be able to choose a generation provider from a competitive market. As part of the restructuring process, the Act requires utilities to divest their generation assets and prohibits their participation in generation services markets.[2]

These changes in industry structure necessarily impact the means by which the State has implemented its energy policy. Traditionally, utilities engaged in a regulated least-cost planning process, subject to Commission oversight, to select the mix of energy resources to meet electric demand in the State. This process ensured compliance with state energy policy currently embodied in the Maine Energy Policy Act, 35-A M.R.S.A. § 3191, the Small Power Production Act, 35-A M.R.S.A. §§ 3301-3309, and the Electric Rate Reform Act, 35-A M.R.S.A. §§ 3151-3155. The Legislature enacted these provisions at a time when the electric utility industry was fully integrated, and the provisions are premised on the existence of that structure.

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[1]An Act to Restructure the State's Electric Industry (the Act), P.L. 1997, ch. 316 (codified as Chapter 32 of Title 35-A M.R.S.A. §§ 3201 through 3217).

[2]Utility affiliates may participate in the generation market. 35-A M.R.S.A. §§ 3205, 3206 and 3207.

In enacting the restructuring legislation, the Legislature recognized that, because generation services are being deregulated, its energy policies could no longer be implemented through the regulation of utility resource decisions. As a result, the Legislature included a provision in the Act to promote renewable resources in a restructured environment. That provision contains an explicit pronouncement of legislative policy in this area:

> In order to ensure an adequate and reliable supply of electricity for Maine residents and to encourage the use of renewable and indigenous resources, it is the policy of this State to encourage the generation of electricity from renewable resources and to diversify electricity production on which residents of this State rely . . . .

35-A M.R.S.A. § 3210(1).

To fulfill this policy, the Legislature required, as a condition of licensing, that each competitive electricity provider provide no less than 30% of its retail sales in the State through renewable resources as explicitly defined in the statute, and directed the Commission to adopt rules to implement the requirement. 35-A M.R.S.A. § 3210(3).[3] In considering such rules, we have attempted to satisfy the legislative purposes and objectives of the portfolio requirement, while minimizing the cost of compliance to competitive providers.

Pursuant to 35-A M.R.S.A. § 3210(3), the rules implementing the portfolio requirement are "major substantive rules" as defined and governed by 5 M.R.S.A. §§ 8071-8074. The Commission must adopt these rules "provisionally." The Legislature will review the provisional rules and authorize their final adoption either by approving them with or without change or by taking no action, 5 M.R.S.A. § 8072.

II. THE INQUIRY PROCESS

Prior to developing the proposed rule, we conducted an inquiry in Docket No. 97-584 into the issues and alternative approaches to implementing the renewable resource provisions of the Act. We received written comments from: the Public Advocate on behalf of members of the Electric Consumers Coalition,[4] the

[3]The statute also requires the Commission to adopt by rule a program allowing retail customers to make voluntary contributions to fund renewable resource research and development. 35-A M.R.S.A. § 3210(5). We will establish this program through a separate rulemaking (Docket No. 98-620).

[4]The Public Advocate indicated that representatives of the

State Planning Office, Central Maine Power Company (CMP), Bangor Hydro-Electric Company, Maine Public Service Company, Van Buren Light & Power District, Pamela Prodan, Frederick Munster, Coalition for Sensible Energy (CSE), Hans Nicolaisen, Independent Energy Producers of Maine (IEPM), FPL Energy Maine, MainePower and the Union of Concerned Scientists. After review of the written comments, the Commission circulated a draft rule on the portfolio requirement and convened a technical conference to further discuss the issues related to the renewable resource rules. The Public Advocate, Maine Public Service Company, MainePower, Hydro-Quebec, IEPM, CSE, and Pamela Prodan attended the conference. As with our other inquiries regarding restructuring matters, the comments and input from interested parties were extremely helpful in allowing us to define the issues and consider alternatives in implementing the legislative policies on renewable resources.

III. DISCUSSION OF INDIVIDUAL SECTIONS

A. Section 1: Purpose

The proposed rule summarizes the purpose of the Chapter as implementing the State's policy to encourage generation of electricity from renewable resources through the adoption of a 30% portfolio requirement.

B. Section 2: Definitions

This section contains definitions of terms used throughout the proposed rule. The definitions are self-explanatory. We have modified the statutory definition of "aggregator" to clarify the type of entity that is not subject to the rule's requirements.

C. Section 3: Provider Obligation

Section 3(A) defines the 30% portfolio obligation as an energy requirement applicable to each competitive provider's total kilowatt-hour sales within the State over a 12-month period. The provision specifies that the requirement applies to standard offer providers.

American Association of Retired Persons, the Independent Energy Producers of Maine, the Coalition for Sensible Energy, the Industrial Energy Consumers Group, and Hans Nicolaisen participated in discussions that led to the Public Advocate comments.

The majority of commenters stated that the requirement should be in terms of energy. However, CMP argued that the requirement should be a percentage of capacity. The proposed rule includes an energy requirement because such an interpretation is more consistent with both the language and purpose of the statute. As quoted above, the legislative policy is to "encourage the generation of electricity from renewable resources . . . ." The commonly understood meaning of this language would be to encourage the actual production of energy through renewable resources, rather than simply having capacity available. Moreover, one of the primary attributes of renewable resources is the environmental benefits that derive from actually producing energy in lieu of using other resources.

Several commenters suggested that the 30% requirement be applied to each individual product sold within the State, as opposed to the provider's total sales within the State. These commenters suggest that such an approach would be more equitable and understandable in that every retail customer would pay a share of any increased costs that result from the 30% requirement and every disclosure made to customers would have at least 30% of renewables.[5] Our view is that the suggested approach is contrary to the legislative intent and purpose of the portfolio requirement. The statutory language clearly contemplates that the 30% requirement would apply to each competitive provider rather than individual products:

> As a condition of licensing pursuant to section 3203, each competitive electricity provider in this State must demonstrate . . . that no less than 30% of its portfolio supply resources for retail electricity sales in the State are accounted for by renewable resources.

35-A M.R.S.A. § 3210(3). Furthermore, to the extent that there is a naturally occurring market for electricity products made up of more than 30% renewable resources, the suggested approach would effectively increase the requirement for renewable resources above 30%. Such a result may be accompanied by a cost impact that could offset the legislative balance of promoting the use of renewable resources with the cost of doing so.

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[5]In conjunction with a region-wide effort, the Commission is considering rules that would require retail providers to disclosure to customers the resource mix used to generate electricity to serve their loads. Inquiry into Regional Uniform Customer Information Disclosure (Docket No. 98-234).

Section 3(B) specifies that the 30% requirement must be met over a 12-month period. The use of annual compliance periods offers providers greater flexibility to meet the requirement, which should translate into a reduced cost of compliance. For example, some commenters stated that reliance on a hydro facility to meet the portfolio requirement would be problematic unless the requirement extended over sufficient time because the output of such facilities often varies greatly over a year.

Section 3(C) specifies the compliance period for providers that offer service to Maine customers for less than a calendar year. If the service begins more than 6 months prior to the following December 31, then the 30% requirement must be met over a shortened compliance period from the beginning of service to the next December 31. However if the service begins less than 6 months prior to December 31, the compliance period extends beyond the year to the second December 31 following the beginning of service. The provision is structured this way because there could be a potentially great burden in meeting a 30% portfolio requirement over a period of time less than 6 months. However, for a period greater than 6 months, there should be enough time for the provider to reasonably meet the 30% requirement. This approach seems reasonable especially in light of the cure period provision contained in section 6 of the proposed rule.

Section 3(D) exempts aggregators and brokers from complying with the portfolio requirement because, by definition, such entities neither take title to electricity nor sell electricity directly to consumers.

D. Section 4: Eligible Renewable Resources

This section governs the eligibility of generation resources that may be counted towards satisfying the portfolio requirement. Consistent with the statute, section 4(A) specifies that eligible generation facilities include qualifying small power production and cogeneration facilities as defined under federal regulations, and facilities with maximum capacities that do not exceed 100 MW and that use specified fuels and technologies.

Section 4(B) interprets the statutory requirement that renewable resources be a source of power that "can physically be delivered to the control region in which the New England Power Pool, or its successor . . . has authority over transmission." The proposed rule requires that the energy from an eligible facility actually be delivered to the ISO-NE control area[6] and that the energy must be counted in meeting load in New England

[6]The ISO-NE control area is identical to the NEPOOL control area.

pursuant to the ISO-NE rules. Because the ISO-NE rules do not recognize individual generation facilities of less than 5 MW, we have also included energy as physically deliverable if it is in any way used to satisfy load within the ISO-NE control area.

The section also has an identical provision for the Maritimes control area. The northern part of the State is not within the NEPOOL control area, but is in the Maritimes control area. Thus, we believe it to be an oversight that the Legislature omits reference to a resource being delivered to the control area which includes Northern Maine. We therefore have included language specifying that the energy from an eligible facility can also be delivered to the Maritimes control area if such energy is recognized by the rules of the Maritimes control area as serving load in the geographic area that constitutes the Maritimes control area; we will ask the Legislature for a corresponding amendment to the statute in the context of its major substantive rule review.

Section 4(C) clarifies that if a facility uses more than one fuel or technology, only energy generated by a fuel or technology that constitutes renewable generation can count towards the portfolio requirement.

Similarly, section 4(D) clarifies that energy from a pumped-storage hydro facility that uses a fuel or a technology that does not constitute renewable generation for its pumping requirements may not be used to satisfy the portfolio requirement.

Section 4(E) provides that a provider or other interested person can request an advisory ruling from the Commission as to whether any particular generation facility is an eligible generation facility under the rule. We have included this provision because the comments in the Inquiry revealed that there may be a variety of situations in which it is not obvious whether a particular "facility" satisfies the requirements of the rule. Rather than attempting to anticipate all such situations, this provision allows the Commission to make such determinations as necessary if the case arises.

E. Section 5: Verification; Reporting

Section 5(A) specifies that it is the obligation of the competitive provider to demonstrate compliance with the portfolio requirement. Upon consideration of the comments, we have concluded that, at least at the current time, there is no mechanical or automatic mechanism to ensure compliance with the requirement. We, therefore, put the burden on competitive

providers to demonstrate through reporting requirements that they have complied with the requirement.

Section 5(B) states that energy that a provider counts towards Maine's portfolio requirement may not be sold, marketed, or otherwise claimed as serving load in other jurisdictions. One of our largest concerns in this area is that renewable generation not be, in essence, "double-counted" by having the same kilowatt-hour used to satisfy the portfolio requirement in Maine and for example, marketed as "green power" in another state. This section makes it absolutely clear that such "double-counting" is not acceptable.

Section 5(C) requires each competitive provider to file an annual report on or before May 1 of each year, demonstrating compliance with the portfolio requirement over the prior calendar year. We have structured this provision to be consistent with the more generic annual reporting requirement in our licensing rule, Chapter 305, in that both provisions use a calendar year as the reporting period and May 1 as the filing date. This approach should ease the administrative burden of compliance on competitive providers.

The annual report provision specifies the minimum information that must be provided. In proposing the reporting requirement, we have balanced the need for information to verify compliance against the burden on providers to submit the information. For the most part, the annual report requires the provider to specify the amount of its load in Maine and New England and the resources that served the load. The provisions require information on both Maine and New England sales to allow the Commission to verify that double counting has not occurred. To the extent load is served by system contracts making it infeasible to specify a particular generation unit, a provider may designate the system contract as the source of generation.

Section 5(D) requires a certification that the portfolio requirement has been met and that kilowatt-hours designated for this purpose have not been "double-counted" in other jurisdictions. This certification requirement adds additional assurance that the provider's demonstration of compliance is accurate.

Section 5(E) requires an applicant for a competitive provider license to provide an initial demonstration statement describing how the portfolio requirement will be met. This provision is required by the licensing section of the statute. 35-A M.R.S.A. § 3203(2)(D). We understand that at the time of licensing, a competitive provider may only have a relatively vague plan for how they anticipate meeting the portfolio

requirement. For this reason, the initial demonstration statement requires only a general description of how the provider intends to satisfy the requirement.

Sections 5(F) and (G) specify that the Commission may obtain additional information from competitive providers if it finds that such information is necessary for it to enforce compliance with the portfolio requirement and that, to the extent any information required pursuant to the reporting section of the rule is confidential, the Commission may subject such information to appropriate protective orders.

F. Section 6: Non-compliance; Sanctions

This section of the proposed rule contains provisions concerning non-compliance with the portfolio requirement and sanctions for such violations.

Section 6(A) provides for a “cure period” for competitive providers who do not serve 30% of their sales in Maine with eligible resources, but have done so with at least 20% of their sales. We have included this provision because there may be situations where, despite good faith efforts, a provider cannot meet the full 30% requirement. The cure period provision provides an additional year for the provider to satisfy the 30% requirement so that, over the two-year period, 30% of the kilowatt-hour sales are served by eligible resources. Moreover, the provision specifies that the Commission may extend the cure period upon a showing that the provider has an interest in an eligible facility that will be in service within two years and whose energy output will allow for compliance. This provision provides added flexibility for providers to rely on new renewable resources, rather than depending on the existing market.

Section 6(B) contains sanctions for providers that do not comply with the portfolio requirement rules. The section provides the Commission with a variety of sanctions that may be exercised as a matter of discretion, allowing the Commission flexibility to address a wide variety of circumstance that may arise in the new electricity market. The section provides for license revocation and monetary penalties pursuant to the Commission’s more general rules governing sanctions for competitive provider rule violations (Chapter 305), as well as other appropriate sanctions that are authorized by law. The section also contains an “optional payment” provision that would allow the provider an option to avoid a license revocation by making a payment into the renewable resource research and development fund established pursuant to 35-A M.R.S.A. § 3210(5). The amount of the payment will be based on the difference between the market price of energy from eligible facilities and energy

from other facilities.[7] Essentially, this provision would allow a provider to voluntarily surrender amounts that it may have saved through non-compliance into a fund whose purpose is to promote renewable resources through research and development.

The section allows the Commission to waive the imposition of sanctions upon a showing that a competitive provider could not, in good faith, satisfy the requirement due to market conditions. This provision is a result of concerns that there may be a market concentration of renewable resources that could result in such resources not being available at reasonable prices.[8] This provision will allow the Commission the flexibility to address such a situation if market concentration is shown to exist.

G. Section 7: Waiver or Exemption

This section contains the Commission's standard language for a waiver or exemption from the provisions of the rule that are not inconsistent with its purposes or those of Title 35-A Restructuring Act.

H. Tradable Credits

Several commenters suggested that it would be desirable for the Commission to implement a tradable credit system in conjunction with the portfolio requirement. A tradable credit system essentially involves the creation of a secondary market in which "renewable credits" can be bought and sold separately from the sale of the energy (kWhs) to satisfy the portfolio requirement. Such a system could provide additional flexibility in meeting the portfolio requirement that may translate into lower costs of compliance.

We have decided not to include a tradable credit system in the proposed rule. The creation of such a system would be complex in relation to Maine's retail electricity market, and would require an entity to administer and verify the system. Moreover, a tradable credit system would likely be incompatible with regional efforts to implement uniform customer disclosure requirements.[9] Under the disclosure system endorsed by the New

[7]The rule explicitly states that the payment will be "based on" the market price difference. This is to avoid a requirement for the Commission to make a precise determination of the cost difference, if that difference is difficult to assess.

[8]This issue is part of the market power study currently being conducted by the Commission and the Attorney General pursuant to P.L. 1997, ch. 447.

[9]The Commission will propose rules on customer disclosure

England Conference of Public Utilities Commissioners (NECPUC) and adopted by the Massachusetts Department of Telecommunication and Energy, all kilowatt-hours sold in the region must be ascribed fuel and emission attributes. Under a Maine portfolio tradable credit system, once a credit is sold separate from the kilowatt-hour, that kilowatt-hour no longer has the attribute to report for disclosure purposes. Thus, it appears that the two systems cannot co-exist.

To conclude, we note that the flexibility for compliance contained in the proposed rule (e.g., annual energy requirement, cure period) should offset, to some degree, the flexibility lost by not adopting a tradable credit system. Moreover, we expect that the selling of portions of the output of renewable generation will constitute a sufficiently robust market to allow any company, regardless of the characteristics of its "owned" generation, to participate in the market in Maine.

IV. RULEMAKING PROCEDURES

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. A public hearing on this matter will be held on September 24, 1998 at 9:00 a.m. in the Public Utilities Commission hearing room.[10] Written comments on the proposed rule may be filed until October 5, 1998. However, the Commission requests that comments be filed by September 21, 1998 to allow for follow-up inquiries during the hearing; supplemental comments may be filed after the hearing. Written comments should refer to the docket number of this proceeding, Docket No. 98-619, and sent to the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.

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requirement in an upcoming rulemaking proceeding.

[10]The Commission will hold three rulemaking hearings related to renewable resources in the following order: portfolio requirement (Docket No. 98-619), voluntary research and development fund (Docket No. 98-620), and net energy billing (Docket No. 98-621).

Please notify the Commission if you need special accommodations to make the hearing accessible to you by calling 1-287-1396 or TTY 1-800-437-1220. Requests for reasonable accommodations must be received 48 hours before the scheduled event.

In accordance with 5 M.R.S.A. § 8057-A(1), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested persons to comment on the fiscal impact and all other implications of the proposed rule.

The Administrative Director shall send copies of this order and proposed rule to:

1. All electric utilities in the State;

2. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;

3. All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

4. All persons on the service list or who filed comments in the Inquiry, Public Utilities Commission, Inquiry into a Renewable Resource Portfolio Requirement, Docket No. 97-584;

5. All persons on the service list or who filed comments in the Inquiry, Public Utilities Commission, Inquiry into an Inquiry into Effects of Restructuring on Contracts between Qualifying Facilities and Electric Utilities, Docket No. 97-497;

6. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and

7. The Executive director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

Accordingly, we

O R D E R

1. That the Administrative director send copies of this Notice and attached proposed rule to all persons listed above and compile a service list of all such persons and any persons submitting written comments on the proposed rule.

2. That the Administrative Director send a copy of this Notice of Rulemaking to the Secretary of State for publication in accordance with 5 M.R.S.A. § 8053.

Dated at Augusta, Maine this 25th day of August, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent